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No. 94-551

In The

Supreme Court of the United States

October Term, 1994

JOHN HARRIS,

Petitioner,

vs.

CITY OF AKRON, GREG BURGOON, JOHN HYMES AND JOHN DOE(S),

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KATHRYN W. PASCOVER
Counsel of Record
MAX ROTHAL, Director of Law
LAURA A. KILLIAN
161 S. High Street
Suite 202
Akron, Ohio 44308
(216) 375-2030

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20pp

LIST OF PARTIES

The parties before the Court of Appeals and this Court are Petitioner, John Harris and Respondents City of Akron, Building Inspection Superintendent Greg Burgoon and Chief Building Inspector John Hymes.

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Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 20 F.3d 1396 (6th Cir. 1994). The opinion of the district court is unreported.

STATUTORY PROVISIONS INVOLVED

Ohio Constitution

Article I §19 [Inviolability of private property.]

> Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner. (See Const. 1802, Art VIII, §4.)

Ohio Revised Code §2744.09 Actions and claims exempted from provisions.

> This chapter does not apply to, and shall not be construed to apply to, the following:
>
> (A) Civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability;
>
> (B) Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision;

(C) Civil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his employment;

(D) Civil actions by sureties, and the rights of sureties, under fidelity or surety bonds;

(E) Civil claims based upon alleged violations of the constitution or statutes of the United States, except that the provisions of section 2744.07 of the Revised Code shall apply to such claims or related civil actions.

SUMMARY OF ARGUMENT

Petitioner seeks review of the decision of the Court of Appeals for the Sixth Circuit affirming the decision of the district court for the Northern District of Ohio granting summary judgment in favor of Respondents. Petitioner asserts three reasons for review: whether the purported deference of the Sixth Circuit to the conclusion of City building department officials that an emergency existed is inconsistent with this Court's decision in *Waters v. Churchill*, 114 S. Ct. 1878 (1994); whether the decision of the Sixth Circuit raised an important issue of federal law as to the necessity of a reasonable basis for a decision to dispense with procedural safeguards; and whether the state inverse condemnation remedy is an adequate post-deprivation remedy despite the existence of the state political subdivision tort liability statute in Ohio. None of the grounds asserted by Petitioner present any substantial issue for review by this Court.

Petitioner's claim that the decision of the Sixth Circuit below is inconsistent with the Court's decision in *Waters v. Churchill* is misplaced. The principle articulated in *Waters*, a case involving the discharge of a government employee, sets forth procedural safeguards mandated by the First Amendment to the Constitution. The *Waters* case has no application to the facts or law at issue in this case. *Waters* did not purport to apply in the Fourteenth Amendment due process context nor does it change the substantial body of law on procedural due process upon which the Court of Appeals for the Sixth Circuit relied.

Petitioner contends that the decision of the Court of Appeals for the Sixth Circuit raises an issue of the need for government officials to have a reasonable basis for a decision to dispense with procedural safeguards before depriving a person of property. However, Petitioner maintains that postdeprivation remedies, even if adequate, are insufficient. This issue has long been decided. This Court has consistently held that, in certain circumstances, the existence of adequate postdeprivation remedies is all the procedure which is due. *Parratt v. Taylor*, 451 U.S. 527 (1981). No procedural safeguards are dispensed with. Respondents could not dispute that judicial review must be available to safeguard against abuse; however the postdeprivation remedy available and recognized by the courts below provides the necessary judicial review. Petitioner simply has voiced a preference for federal court.

Petitioner maintains that Ohio's Political Subdivision Tort Liability Act, Ohio Revised Code Chapter 2744, vitiates the adequacy of the state inverse condemnation remedy. Not only did Petitioner fail to preserve this issue in

this form in the court below, but Petitioner's argument misapprehends the nature of an action for inverse condemnation. Although Ohio Revised Code Chapter 2744 does not confer absolute immunity on Respondents from an action for inverse condemnation, the applicability of statutory immunity to inverse condemnation claims has not been decided by the state courts of Ohio and therefore should not be addressed by this Court.

REASONS FOR DENYING THE PETITION

I. THE "REASONABLENESS" STANDARD FOR GOVERNMENTAL DECISIONS IN FIRST AMENDMENT CLAIMS ESTABLISHED IN *WATERS V. CHURCHILL*, 114 S. CT. 1878 (1994) IS NOT AN APPLICABLE STANDARD BY WHICH TO EVALUATE THE RESPONDENTS' ACTIONS IN PETITIONER'S FOURTEENTH AMENDMENT CLAIM.

The Court of Appeals for the Sixth Circuit found in the case below that although there was a genuine factual dispute as to whether an emergency existed on Petitioner's property, this factual issue was immaterial to Petitioner's constitutional claims. Petition at App. 16. In his continued attempt to equate the possibility of an incorrect determination of an emergency with a constitutional violation, Petitioner concludes that the Court of Appeals decision "gives government officials the sole and final word for determining the factual predicates for denials of life, liberty or property under the due process clauses . . . " and that the Court of Appeals decision conflicts with *Waters v. Churchill*. Petition at 15. However,

Petitioner's sweeping statement itself conflicts with *Waters*; *Waters* is clearly inapplicable to the case at hand.

In *Waters v. Churchill*, 114 S. Ct. 1878 (1994), Churchill, a public employee, was fired allegedly because of statements she made to a co-worker. Churchill filed a 42 U.S.C. §1983 action alleging that the firing violated her First Amendment guarantee to free speech. The critical issue in *Waters* was the actual content of the statements Churchill allegedly made in light of two conflicting versions of her statements. Churchill's position was that the appropriateness of the decision about her termination should be based on actual facts of her statements as determined by the finder of fact. The employers, on the other hand, argued that the appropriateness of their decision should be gauged by the facts they, the employers, had relied upon in the termination decision.

Justice O'Connor, in *Waters*, states that even when decision makers have special expertise and special needs, deference to their decisions has never been complete. *Waters*, 114 S. Ct. at 1889. The Court's plurality opinion continues that "employer decisionmaking will not be unduly burdened by having the courts look to the facts as the employer *reasonably* found them to be." *Id.* (emphasis in original). Under *Waters*, a predeprivation process and reasonable inquiry standard has been adopted in First Amendment free speech cases.

In contrast, Petitioner's claim involves the Fourteenth Amendment Due Process Clause and the correctness of a decision which, under well-established law, may be adequately addressed by a postdeprivation process.

Petitioner correctly acknowledges that in cases of emergencies requiring urgent action, officials may deprive persons of rights protected under the Fifth and Fourteenth Amendments without predeprivation process. Petition at 15. *See also, Ewing v. Mytinger & Casselberry,* 339 U.S. 594 (1950); *North American Cold Storage v. Chicago,* 211 U.S. 306 (1908); and *Parratt v. Taylor,* 451 U.S. 527 (1981). However, as indicated in *Waters,* the provision of an adequate process does not create a constitutional guarantee of a correct decision, but rather "the only protection . . . the Constitution gives . . . is a right to adequate procedure." *Waters,* 114 S. Ct. at 1890.

In a case such as Petitioner's, a postdeprivation process or procedure is an adequate constitutional safeguard because "extraordinary situations where some valid governmental interest is at stake . . . justifies postponing the hearing until after the event." *United States v. Good Real Property,* 114 S. Ct. 492, 503 (1993), *quoting Fuentes v. Shevin,* 407 U.S. 67, 80-81 (1972), *quoting Boddie v. Connecticut,* 401 U.S. 371, 379 (1971) and *citing United States v. $8,850,* 461 U.S. 555, 562 (1983). Whether there should be an exception to the predeprivation hearing depends on balance of 1) the private interest affected, 2) the risk of erroneous deprivation through the procedure used and 3) the governmental interest involved. *Id.* at 503, *citing Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

Section 190.705 of the City of Akron, Ohio Code of Ordinances codifies the *Mathews v. Eldridge* balance with respect to emergency demolition of unsafe buildings or structures. While Section 190.705 provides the procedure by which unsafe structures may be razed when those structures threaten the safety and welfare of the people,

Petitioner below never challenged the procedure established by §190.705.

Instead, Petitioner claims a constitutional infringement because of the possibility that Respondents' decision to raze his building was incorrect.[1] The correctness of Respondents' decision may be a legitimate issue for Petitioner to raise, but it is not a legitimate issue for this Court to consider as a constitutional question. The Court in *Waters* reaffirmed that while a person may "challenge the substantive accuracy of . . . conclusions under . . . some state statute or common-law cause of action . . . this protection is not mandated by the Constitution". *Waters*, 114 S. Ct. at 1890. The Court of Appeals pointed to Ohio's inverse condemnation action as the method to determine the accuracy of Respondents' decision. Petition at App. 18. A state court in Ohio, and not the United States Supreme Court, is the appropriate forum for Petitioner's claim that the decision to raze his building was factually in error.

Although Petitioner relies on *Waters v. Churchill* to bolster his argument that this Court should examine the correctness of Respondents' decision to raze his building, such reliance is unwarranted. *Waters* involves the examination of a predeprivation process in a First Amendment claim while Petitioner's case involves a Fourteenth

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[1] The demolition recommendation was made by Chief Building Inspector, John Hymes; Greg Burgoon, Building Inspection Superintendent made the actual decision to conduct an emergency demolition of the structure.

Amendment due process claim in which a postdeprivation process is adequate. *Waters* held only that an official's decision which may subsequently infringe on First Amendment rights must be "reasonable". *Waters*, 114 S. Ct. at 1889. *Waters* does not directly, or by implication, address a procedural due process claim where postdeprivation process is constitutionally all that is due. To examine Respondents' decision to raze Petitioner's building under a *Waters* "reasonableness" standard would be to stretch the *Waters* decision beyond its very parameters. For this reason, this Court should not grant the Petition for Writ of Certiorari.

II. THE DECISION BELOW RAISES NO IMPORTANT ISSUES OF FEDERAL LAW AS TO THE NEED FOR A REASONABLE BASIS TO DISPENSE WITH PROCEDURAL SAFEGUARDS.

Petitioner apparently contends that there are no circumstances under which a postdeprivation hearing constitutes due process. Although Petitioner articulates that postdeprivation remedies, even adequate ones, may be available, such remedies "leave fundamental rights at risk". Petition at 20. This position indeed would be a radical departure from long established precedent and one which is not called into question by the *Waters* case. It is not disputed that the Due Process Clause of the Fourteenth Amendment generally contemplates some type of hearing prior to a state's deprivation of an individual's liberty or property. *Zinermon v. Burch*, 494 U.S. 113 (1990); *Parratt v. Taylor*, 451 U.S. 527 (1981). However, as this Court has repeatedly determined, the "postponement of the judicial inquiry is not a denial of due process,

if the opportunity given for ultimate judicial determination of liability is adequate". *Parratt v. Taylor*, 451 U.S. 527, 540; *Mitchel v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Zinermon v. Burch*, 494 U.S. 113, 128; *United States v. Good Real Property*, 114 S. Ct. 492, 503 (1993).

Respondents wholeheartedly support Petitioner's statement that judicial scrutiny of the actions of state officials, faced with the necessity of quick action, be available. Petitioner below never challenged the procedure set forth in City of Akron, Ohio Code of Ordinances §190.705. Notwithstanding Petitioner's failure to challenge §190.705, Respondents' actions under §190.705 are subject to judicial scrutiny in state court proceedings which are available to Petitioner.

Respondents would not argue that the issue of post-deprivation judicial scrutiny of the state's action is an important one; rather Respondents only need point out that the issue has been and remains well settled. No procedural safeguards have been dispensed with because Petitioner received all the process that was due him. Respondents' actions were in fact reasonable and the judicial review confirming those actions properly must take place first in state court.

III. THIS CASE RAISES NO IMPORTANT ISSUE OF FEDERAL LAW REGARDING THE ADEQUACY OF OHIO'S INVERSE CONDEMNATION ACTION.

Petitioner apparently does acknowledge that there are situations where the need for quick action may necessitate the state taking action to deprive a person of

property prior to a hearing. Petition at 15. Petitioner has contended that Respondents erred in the decision to demolish his building as an emergency pursuant to Code of Ordinance Akron, Ohio §190.705. Petitioner, however, never challenged City of Akron, Ohio Code of Ordinances §190.705; rather, Petitioner maintained throughout that Respondents' conclusions were wrong. This inquiry is precisely that which may be made in the state court proceeding in inverse condemnation.[2] *Solly v. City of Toledo*, 7 Ohio St. 2d 16, 218 N.E. 2d 463 (Ohio, 1966).

Contrary to Petitioner's present assertion, the Court of Appeals for the Sixth Circuit did not ignore an argument that Petitioner contends was made that Respondents have "absolute statutory immunity in state damage suits of the type petitioner had". Petition at 21. Respondents have not argued in this litigation that Respondent would be statutorily immune from an action in inverse condemnation. It was Respondents' position that Petitioner's First Amended Complaint may have attempted to articulate a state tort claim for negligent or intentional infliction of emotional harm within Petitioner's federal lawsuit. As the opinion of the Court of Appeals makes clear, this case has a tortured procedural history. Petition at App. 20-21. After Respondents filed a Motion to Dismiss or in the Alternative Motion for Summary Judgment, Petitioner was permitted to file a Second Amended Complaint. The Magistrate Judge issued a Report and Recommendations considering Respondents' Motion which was filed in response to Petitioner's First

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[2] In fact, Petitioner has now filed an action in state court asserting a number of state law claims.

Amended Complaint. In that Report, the Magistrate found that Petitioner's Second Amended Complaint did not contain a derivative state tort claim and further that the issue of Ohio Revised Code Chapter 2744 political subdivision immunity was rendered moot. Petition at App. 41. Perhaps more importantly, the Magistrate Judge concluded that Petitioner did have an adequate state law remedy. Petition at App. 34-35. Petitioner filed no objections to the Report and Recommendation of the Magistrate Judge. Therefore, as Petitioner did not file objections to the Magistrate Judge's determination that an adequate state remedy existed or that the issue of tort immunity contained in Ohio Revised Code Chapter 2744 was moot, Petitioner has waived such arguments on appeal. *Thomas v. Arn*, 474 U.S. 140 (1985).

Without regard to Petitioner's failure to preserve his arguments, the fact remains that Petitioner did have an adequate state law remedy in inverse condemnation. Respondents did not assert that Respondents would be immune from such actions, nor could they. By its very nature, an action in inverse condemnation arises from the constitution and is not dependent on a traditional state tort cause of action. Article I, §19 of the Ohio Constitution provides that:

> Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a

> compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner. (See Const. 1802, Art VIII, §4.)

Respondents' authority to act, under Respondents' unchallenged emergency demolition ordinance, derives from the fact that there was an emergency. Petitioner had not filed an action in state court to challenge Respondents' authority to act under the emergency. Respondents have never claimed that, if their decision that emergency abatement was necessarily proved to be incorrect, Petitioner might not be entitled to compensation. Petitioner below claimed that an action in inverse condemnation is lengthy and speculative and, because it is brought as a mandamus, it is an extraordinary action. However, the Court of Appeals for the Sixth Circuit and other federal courts in Ohio have recognized the adequacy of Ohio's inverse condemnation remedy in a taking context. Petition at App. 18; *Silver v. Franklin Tp. Bd. of Zoning Appeals*, 966 F.2d 1031 (6th Cir. 1992); *Triomphe Investors v. City of Northwood*, 835 F. Supp. 1036 (N.D. Ohio 1993). Finally, notwithstanding the fact that Respondents did not raise Ohio Revised Code Chapter 2744 political subdivision tort immunity as a bar to an inverse condemnation claim, this issue has not been decided in Ohio state courts and therefore, this Court should refrain from review of this issue.

Petitioner is correct that at the time the Ohio Supreme Court had left open the issue of governmental immunity in suits against the governmental entity for demolition of a building. Petition at 21-22. In fact, the

Court chose not to consider the question. "Also, Toledo has not raised any questions as to governmental immunity. Hence we express no opinion on such question". *Solly*, 218 N.E. 2d 463, 466. Nonetheless, Petitioner has pointed to no case, either herein or below, which has decided the impact, if any, of Ohio Revised Code Chapter 2744 on an action for inverse condemnation.[3] Therefore, this Court should decline to grant review of an issue of unsettled state law which, according to Petitioner, at best may be "relevant" to Petitioner's due process claim. Petition at 23, footnote 9.

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[3] Ohio Revised Code 2744.09 expressly does not apply to claims based on alleged violations of the United States Constitution:

> §2744.09 Actions and claims exempted from provisions.
>
> This chapter does not apply to, and shall not be construed to apply to, the following:
>
> . . . (E) Civil claims based upon alleged violations of the constitution or statutes of the United States,. . . .

CONCLUSION

Petitioner has failed to show any basis for this Court to grant review. The decision of the Court of Appeals for the Sixth Circuit is consistent with applicable law and does not warrant review. Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

KATHRYN W. PASCOVER
Counsel of Record
161 S. High Street, Suite 202
Akron, Ohio 44308
(216) 375-2030

MAX ROTHAL, Director of Law
LAURA A. KILLIAN
161 S. High Street, Suite 202
Akron, Ohio 44308
(216) 375-2030

Counsel for Respondents
City of Akron, et al.